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LEGAL DUTIES AND RIGHTS.

Every student and practitioner of our law will doubtless assent to the statement that it is extremely desirable that the amorphous bulk of which it now consists, which is becoming continually more and more unmanageable as each year's contribution of reports and text-books is poured out, should be reduced to a logical and scientific arrangement. Whether that should be embodied in a code is a question on which opinions differ, and which need not be discussed here. A code is not necessary. What is needed is some arrangement which shall be generally accepted by the bench and the bar and followed by legislators and the writers of treatises and digests. It might be prepared and put forth without a code by such a body as the Inns of Court in England, or the American Bar Association in the United States. In that case it could be fully discussed, tested in practice and modified, if necessary, before being authoritatively promulgated in a statute. Indeed, considering how important it would be that the arrangement once adopted in a code should be a final one and how largely the systematic study of the law has been neglected among us, it might be very plausibly argued that no body of codifiers at present would be likely to strike out a satisfactory arrangement, and that it would be better that the arrangement to be followed should be known and generally accepted before the work of codification was begun.

Such an arrangement must rest on an exhaustive analysis of legal conceptions, the results of which must be expressed in a

systematized terminology. The purpose of this article is to make a small contribution towards a scheme of arrangement by analysing the fundamental legal notions of duty, right and wrong.

A legal duty is the legal condition of a person whom the law commands or forbids to do an act. The act may be called the content of the duty; it is what must be described in defining any particular duty. The act itself is a fact, which might exist if there were no law and no duty. The law does not create it, but merely recognizes its actual or possible existence. The duty is a legal condition, the mere creature of the law. The acts which form the contents of legal duties are defined by reference to some of their actual or possible consequences. An act *per se,* a mere bodily movement, is never either commanded or forbidden by the law. There is no conceivable bodily movement which a person in some circumstances might not lawfully do or omit. The movements of the arm and hand which take place in firing a pistol might be performed exactly by a person who had nothing in his hand, and would generally in such a case be lawful, because no harmful consequence could be apprehended from them. If he held an unloaded pistol, no physical injury could follow to any person at whom the pistol was aimed, and so far as the act might be prohibited with reference to such consequences, the prohibition would not apply. But if the latter person believed the weapon to be loaded, the act might create in him an apprehension of injury, and that psychical consequence might suffice to make the act unlawful as amounting to an assault.

The consequences by reference to which the act is defined, which may be called its definitional consequences and also the definitional consequences of the duty, are either actual, probable or intended consequences. This gives rise to a three-fold division of duties, as follows. 1. Peremptory duties: the definitional consequences are actual. The person must or must not act in such a way as actually to produce a certain consequence. The law does not specify the acts any farther than to point out the result which must be attained. But the requirement to attain that result is usually peremptory; it is not enough that the person subject to the duty has done all in his power to attain it and has failed by no fault of his own. The duty to pay a debt is of this sort. The debtor must peremptorily do such acts as are necessary to put the creditor into the possession of the money. He may choose his own means, but chooses them at his peril. The duty of a person who voluntarily keeps a dog known to him to be ferocious and inclined to bite

mankind to prevent it from doing so, is of this class. He is not merely bound to keep it carefully, or even with extreme care; he must absolutely prevent that result. In a few cases where the act is defined by actual consequences and the duty is negative, not to cause a certain result, it may be that the duty is not strictly peremptory, but is conditioned on intention or negligence. Duties not to commit trespasses are duties defined by actual consequences, but it is still a mooted point whether intention or negligence is necessary to a trespass.

2. Duties of reasonableness: the act is defined by reference to its probable consequences. The person must not do any act that is unreasonably likely to cause a certain consequence or must do such acts as are reasonably necessary to prevent its happening. If he does so much as this, he has done his whole duty and is not responsible for what actually happens; if he acts so as to incur an unreasonably great risk of the consequence happening, he has broken his duty, though in fact by good luck it never actually does happen. Thus a person who drives in a crowded street necessarily takes some risk of running over some one. As his speed increases that risk increases likewise. At last a point may be reached at which the risk becomes unreasonably great, and his conduct in driving so fast a breach of duty, even though he does not actually run over any one. So a bailee must not so act or omit to act as to expose the chattel to an unreasonably great risk of loss or injury, what is unreasonable varying according to the circumstances of the case, especially the value of the thing and the nature of the bailment. If the chattel is lost or injured without such conduct on his part, he is not guilty of any breach of duty; the duty is not peremptory to keep it safe. All duties to use due care belong to this class. Negligence, which is the opposite of due care, consists essentially in conduct which involves an unreasonably great risk of causing harm.

3. Duties of intention: the act is defined by reference to its intended consequences. The person must not act with an intention to produce a certain consequence. Making a false representation to another person with an intent to defraud him by leading him to act upon it to his injury is a breach of this sort of duty, and so are all injuries in which malice—that is, actual malice or malice in fact—is an ingredient, all the meanings of actual malice having the common element of an intention to produce some consequence.

There is no general rule for determining what legal duties exist, what acts are commanded or forbidden by law. Much labor and

ingenuity have been expended in the attempt to find some general criterion of legal right and wrong, some general basis of legal liability. But in vain; there is none. Various acts are commanded or forbidden for various reasons, generally on grounds of expediency; and they are different in different places and periods. In this respect the law presents itself as having a purely arbitrary or positive character, and the duties that exist in any particular system of law must simply be separately learned.

Duties in some cases are owed to particular persons. What is meant by a duty being owed to a person, and how it is known who that person is, will be explained further on.

Rights are of four classes. As these have no recognized names, they may be here designated for convenience sake by the names of correspondent, permissive, protected and facultative rights.

1. Correspondent rights. When one person owes a duty to another to do or abstain from an act, the latter person is said to have a right against the person subject to the duty, to have the act done or not done. If A ought not to beat B, B has a right against A not to be beaten. Such a right is the legal condition of a person to whom a duty is owed. The same act which forms the content of the duty stands also as the content of the right. The duty and the right may be said to correspond to each other; rather they are two names for different aspects of the same thing, *i. e.*, of a certain legal relation between two parties, which looked at from the standpoint of one is a duty owed by him to the other, and from the latter's standpoint is a right which he has against the former. Hence neither can be enferred from the other, because the conclusion is already contained in the premise, or is identical with it. To argue a creditor has a right to his money, therefore the debtor ought to pay, is invalid as involving a *petitio principii,* if a correspondent right is meant.

A right of this sort can not be exercised, but can be violated. To exercise a right means to do, or abstain from, the act which forms its content. But here *ex hypothesi* the only act is one that is to be done, if at all, not by the holder of the right but by the other party on whom the duty rests. There may be some way to enforce the right by compelling that other party to do what he ought to do or to make compensation for not doing so; but enforcement is different from exercise. The violation of a right on the other hand is effected by the conduct of the other party, and is therefore possible of such rights. Moreover a breach of the corresponding duty involves necessarily, or rather is the same thing as, the violation

of the right; the two can not be separated in fact or distinguished in thought.

These rights are of no legal importance as distinct from their corresponding duties. When the duty has been described, enough will have been said about the right; it will not require a separate treatment for any legal purpose. Certain writers of eminence, however, have regarded correspondent rights as the only kind of rights, and have endeavored to set forth arrangements of the law based on that conception. It is submitted that they are in error, for reasons that will appear in the course of the following discussion.

2. Permissive rights. A person is said to have a right to do or abstain from an act when the law does not forbid or command him to do it. A permissive right is the legal condition of a person who is not subject to a duty. Free speech, religious freedom, the freedom of the press, the right of use which the owner of a thing has in it, many of our most important rights and liberties, belong to this class of rights. The content of this kind of a right, like that of the preceding kind, is an act. But, and herein these rights differ from the preceding ones, the act is one to be done by the holder of the right himself and not by the person subject to a corresponding duty. Indeed, there is no such person and no such duty; the conception of right here is a purely negative one, there is no special relation to any particular duty. Therefore these rights can be exercised, but can not be violated. It is true, the holder of the right may be prevented in various ways from doing the acts which he has a right to do. But when such prevention is a violation of right at all, it is because it is effected by interferences with his person or belongings which amount to violations of a different class of rights. If it can be effected without such interference, it is not a violation of right. Thus it is generally not legally wrongful, not a violation of any legal right, to prevent a person from saying something which he wishes to say, from exercising his right of free speech, by threatening to give him a thrashing next week. But it would be to stop him by actually beating him on the spot, because thereby his right of bodily security would be violated, which is a very different right from that of free speech and is not a mere permissive right. But the one mode of prevention, so far as freedom of speech goes, might be as effectual as the other, and would equally be a violation of the right of free speech, if that right could be violated. The provisions for securing freedom of speech and similar permissive rights which are contained in the Constitution of the United States and of the States of the Union,

which are often spoken of as intended to prevent the violation of those rights, are really intended to prevent those rights from being destroyed or taken away by the legislature, to insure their continuing to exist as legal rights. In the absence of such inhibitions these, like all other legal rights, could be abolished by statute. But the abolition, destruction or deprivation of a right is a very different thing from its violation; indeed, is inconsistent with it, for the right must exist to be violated.

A permissive right may be a right in or over a specific thing, or in or over a person who for that purpose stands in a position analogous to that of a thing, as a child whom its father has a right to chastise. In such a case the content of the right is not a class of acts generally, but the acts so far as their consequences affect the thing. The definitional consequence of the act are its effects upon that thing only. The holder of the right is permitted to do or abstain from the act so far as his doing so will affect the thing. Beyond that his right does not justify his acts, except in a few special cases which there is not time to stop and explain here. This is the meaning of the maxim, *sic utere tuo ut alienum non laedas.* A man may exercise his right of free speech, in a case that falls within its scope, without any regard to how much mischief he may do thereby or to whom, because that right of his is general and is not a right in any specific thing. But if he discharges a gun and hits his neighbor, he can not protect himself by the plea that that was an exercise of his right of use in the gun. It was, so far as the effect upon the gun went; had the gun been burst in the firing no one could have complained. But so far as the effect of his act upon his neighbor's body was concerned, his right of use of the gun had no relation at all to that; he had no right to fire the gun so far as it produced that sort of a consequence. He may have had a right to shoot his neighbor on some other ground, *e. g.* that of self-defense, but that would not be a part of his property right in the gun. So if a man turns his vicious bull loose in the street, his conduct is wrongful, not because his right of use in the animal does not extend to that disposition of him, but because of the probability of injurious consequences to persons or things other than the bull; the definitional consequences of the acts which form the content of his permissive rights of property in the bull do not include such consequences.

It may appear at first sight that the remark made above about correspondent rights, that they are of no legal importance in distinction from duties, applies also to permissive rights. This is

true in general as to those rights which do not have specific subjects. The right of free speech is sufficiently apparent from the absence of rules restricting it, and the right of every man to dress as he pleases from the absence of sumptuary laws. But the case is different with specific permissive rights such as permissive rights of property. A tenant for life, the holder of an easement or a bailee, for instance, may deal in certain ways with the thing which is the subject of his right, but not in all ways. An absolute owner may do what he pleases with it. These permissions might, it is true, be set forth as exceptions to the various duties which forbid men to meddle with things. We might define the duties by reference to definitional consequences which consisted in certain effects produced upon things, and then declare exceptions to those duties in cases where the actor had come into those relations with the thing which we call having property rights in it. But the same exceptions of this sort would apply to all duties, and, for reasons which want of space forbids to explain fully here, but some of which will readily occur to the reader, it is more convenient to state them once for all in the form of permissive rights. Here we meet for the first time a principle that will come out more prominently in the discussion of protected rights, that definitions of rights are merely portions of definitions of duties separated from the rest and stated apart for reasons of convenience. The sole object of law is to regulate conduct. A system of law is a description of what acts must or must not be done. Whenever the law appears to be doing anything else, that is merely in some way ancillary to its main purpose. The direct description of conduct commanded or forbidden is the definition of a duty. Duties therefore are the primary legal entities. But as the descriptions of various different duties make use of the same conceptions as elements, it is a matter of obvious convenience to describe these once for all in some part of the system, and then to use them as *praecognos cenda* in the direct definition of duties. That is the part that rights play in law —at least as to form; as to substance, it may be that rights rather than duties are the things of real and primary importance.

The acts that form the contents of permissive rights are always described by reference to their actual consequences. There is nothing in the doctrine of permissive rights corresponding to the threefold division of duties above mentioned. Therefore if a person's act is done in the exercise of a right, his state of mind is unimportant. Generally speaking, a person is legally justified in exercising his rights out of pure malice, not for the purpose of

benefiting himself but merely to do harm to another. Some courts in the United States have admitted certain exceptions to this principle, but they are distinctly exceptions to a general rule and are not recognized everywhere.

Nevertheless, permissive rights are sometimes limited by reasonableness, though not in the same manner as duties. When two persons have rights in the same thing, one may be paramount to the other. If it is absolutely paramount, it may be exercised to its full extent without any regard to how its effect upon the thing interferes with the exercise of the subordinate right, or even to whether it makes any exercise of the latter impossible. An easement is usually thus absolutely paramount to the right of the owner of the soil. And the easement may be of such a nature as practically to prevent the owner from getting any benefit from the land; but this does not prevent the exercise of the easement to its full extent. Or one right may be reasonably paramount, so far that it can be exercised to a reasonable extent, however injurious to the subordinate right, but not paramount to every extent. Thus the right of navigation in navigable waters is paramount to the right of fishing, and a vessel may, if reasonably necessary, hold her course and run over nets; but this should not be done unnecessarily and wantonly. In other cases the two rights are equal, and each permits a reasonable use of the thing with reasonable regard to the equal rights of the other party, but permits no more than that. Rights to use a public highway for passage are of this sort. It thus appears that a permissive right may be a right as to act or to produce certain results absolutely or only to a reasonable extent. The case of the use of a highway illustrates very well the difference between reasonableness in relation to permissive rights and to duties. If a person stands a loaded wagon in a narrow street and thus obstructs the way so that others who wish to can not pass, those consequences of his conduct are actual, not merely probable, and the question will be whether in actually causing such a stoppage he has exceeded his right to a reasonable use of the street. But no right other than his right to use the street is involved. If, however, he drives fast and thus incurs a risk of running over some one, the question will be whether the probability of that result is unreasonably great so as to make his act amount to a breach of his duty to use due care in driving, a duty which corresponds not only to the rights of others in the street, but to their rights of personal security. Of course in many cases an act may be unreasonable in both ways: it may produce actual consequences which

the actor has no right to produce because they amount to an unreasonable appropriation of the road to the exclusion of others, and it may at the same time be a breach of some duty because it is unreasonably likely to cause injury, not necessarily to the road itself, but to persons or things in the road.

It is true of permissive rights as of duties that there is no general rule for determining what rights exist. Indeed this follows from the principle as to duties. The law confers upon men such rights as are deemed expedient.

3. Protected rights. The consequences of acts are states of fact, or more exactly substitutions of one state of fact for another. If A strikes B and wounds him, the former good condition of B's body, which was a state of fact, is destroyed and a worse state of fact, a state of mutilation and pain, substituted for it. So in slander the fact of an existing good reputation is replaced by that of an impaired one. When a debt is paid, the fact of the creditor's possession of the money comes into existence. Not only are acts which are commanded or forbidden defined, as has been said, by reference to their consequences, but they are commanded or forbidden wholly for the sake of the states of fact that form their consequences. It is these alone, not the acts, that are *per se* important; acts have a relative and derivative importance only. While the direct object of law is to regulate conduct, its ultimate and real object is to protect states of fact; its regulation of conduct is to that end only. This protection is of two sorts; sometimes the law seeks to cause a certain state of fact to come into existence, as when it commands the performance of a contract; and sometimes it seeks to prevent the destruction of an existing condition of fact, as when it forbids harmful acts or requires precautions to be taken against harm.

The same act or omission may impair various kinds of protected states of fact. For instance, a single negligent act may injure a man's own person, disable his wife and deprive him of her services, destroy various chattels of his, and subject him to pecuniary loss. And the same state of fact may be impaired by various kinds of acts or omissions. Moreover it is not every state of fact whose existence is or may be of importance to a person that the law undertakes to protect, and of those that it does protect, it gives more extensive protection to some than to others. The condition of a person's body while he is alive is protected to a very large extent; the condition of being alive formerly received only a partial protection, in the days when no civil action lay for causing death.

A person's mental condition is in the main unprotected; generally mental suffering from fear, anxiety, humiliation or invasion of privacy are without legal remedy. Immovable property is protected more fully from injuries by persons or palpable things than from the incursion of impalpable things such as smoke, smells, noises and the like; yet some protection is given against the latter. It is therefore convenient, at least in many cases, to describe the different kinds of states of fact which the law protects separately from the acts by which they may be created, perserved or impaired. It is true that acts can not be fully described without reference direct or indirect, explicit or implied, to the states of fact. But if the facts, which may be complicated, have been previously described and designated by an appropriate name, the reference in defining any particular duty may be a general one only. Also it often happens that the consequences which are directly definitional of a duty are not the state of fact which is ultimately important, but some intermediate state of fact which in its turn will or may affect the ultimate one. For example, a duty not to make a nuisance may often be defined by reference to the existence or condition only of the thing which constitutes the nuisance. The existence of such a thing is what is immediately forbidden; though the object of the prohibition is to prevent injuries to persons or to other things, whose condition is the ultimately important state of fact. This separation for purposes of convenience between the act and the state of fact that is ultimately to be protected by the doing or omission of the act, gives rise to the conception of another class of rights, for legal purposes the most important class, having for their contents the protected states of fact. It makes more clear the meaning of two statements in the foregoing discussion, namely, first, that while in form duty was the primary and important conception in law, in substance right rather than duty was such, and secondly, that a definition of a right was a part of that of a duty separated from the rest for convenience.

A protected right is the legal condition of a person for whom the law protects a state of fact by imposing duties upon other persons whose performance will or will tend to bring the state of fact into existence or prevent its destruction. The protected state of fact, not any act, is the content of the right. Therefore a right of this sort can not be exercised, but can be violated. Any impairment of the state of fact is a violation of the right. In ordinary usage the word violation is applied only to impairments that are

caused by wrongful conduct, by breaches of duty, on the part of others. But it will be convenient to use the word to denote any impairment however caused. In this sense, however, a violation of a right does not always amount to a wrong. If A strikes B with a club and breaks his arm, there is a violation of B's right of bodily security, the condition of his body, which is the state of fact that forms the content of that right, is impaired; and this is due to A's breach of duty and is a wrong. But if A accidentally stumbles against B and knocks him down with the result of breaking his arm, B's right is equally violated; but, since A has done no wrongful act, no act which is a breach of any duty, he has committed no wrong.

Protected rights are absolute or relative. In the former, which are much the more numerous, the right is violated, as above described, by any impairment of the state of fact which constitutes its content, without more. But in a relative right the mere impairment of that state of fact is not by itself sufficient to amount to a violation of the right. There must follow as its consequence an impairment of some secondary state of fact to which the right is said to be relative. Thus the right of personal security is an absolute right; but the right which a husband has in the security of his wife is relative to her services. A physical injury to her is not a violation of his rights unless it causes a loss of services. Every person has two rights of reputation, an absolute right, which is violated by the publication about him of a libel or one of those slanders which are said to be actionable *per se*, and a relative right, relative to his pecuniary condition, which is violated by a slander not actionable *per se* but which actually causes special damage, *i. e.*, pecuniary loss.

When the protected state of fact includes the possession or condition of a thing, the thing is the subject of the right, and the right is said to be a right in, to or over the thing. A person may also stand in the situation of a thing as the subject of a right, as a wife or child.

A duty which is imposed for the protection of a right is said to correspond to that right and to be owed to the holder of it. There is no general rule for ascertaining what duties correspond to any particular right or to what rights any particular duty corresponds. This correspondence is determined by positive rules of law based on various considerations of expediency. Some rights, such as those of bodily security and property rights in material things, have many duties corresponding to them, and other rights,

such as reputation, have few. Some duties, for instance the duty not to make a fraudulent misrepresentation, correspond to many rights, while there are duties, like the duty to take care of dangerous animals, whose range of correspondence is narrower. This subject of the correspondence of duties to rights will be taken up again further on.

When the duty is not defined by reference to the actual consequences of the act, the duty may be broken without any consequences ensuing and therefore without the violation of any right to which it corresponds. If a violation of the right actually takes place, it may be separated by an interval of time from the breach of duty. Even if the definitional consequences of the duty are actual consequences, still if they are such intermediate facts as have been above mentioned and not facts which constitute an impairment of the protected condition of fact, it may still be true that a violation of the right need never follow or may follow only after an interval of time. If, for instance, A lays poison for the purpose of killing B's cattle, there is at once a breach of duty, a completed wrongful act. But if the cattle never find and eat it, B's rights in them are never violated, and even if they do so, it may happen some time after the commission of the breach of duty. But when the duty is defined by actual consequences and these are such as are involved in the content of the protected right, then the duty can not be broken without the right being at the same time violated, though the breach of duty and the violation of right can still be distinguished theoretically for legal purposes. This is the case in a trespass or the failure to pay a debt, and indeed, as will hereafter appear, in breaches of contract generally.

4. Facultative rights. A right of this kind is the legal power or capacity to dispose of some other right which is not vested in the person having the power. Such a power is sometimes exercisable by the mere act of the party himself, as in the case of a power of appointment, and sometimes only by the aid of a court, as in a maritime or equitable lien. A facultative right has no duties corresponding to it and can not be violated; but it can be exercised, its content being acts.

Rights are divided into rights *in rem* and *in personam.* This nomenclature is objectionable, because all rights are against persons and none against things, and rights *in rem* have no necessary relation to things; and in a scientific arrangement of the law some substitute should be found for it. But the terms will be used here because they are the established ones. Rights *in rem* are such as

avail against all the world; rights *in personam* (*certam sive determinatam,* as Austin says) against particular persons only. The importance of the distinction between these two classes of rights has been doubted or denied. But it is practically important, at least as to protected rights, for the following reasons. The contents of protected rights *in rem* consist of a few states of fact, all of which can be easily enumerated and described once for all. Also the duties corresponding to them are different from those which correspond to rights *in personam,* and are capable of exhaustive enumeration and description. Therefore it is possible, and is the method that most conduces to clearness and convenience, to treat rights *in rem* and their corresponding duties separately from each other and to arrange the discussion of them according to the nature of their contents. This will more clearly appear from the enumeration of rights *in rem* presently to be attempted.

On the other hand, the contents of rights *in personam* and of their corresponding duties are very various, being determined in most cases by the will of the parties to some agreement, the duties are all so defined that their breach can not be separated from the violation of the right nor can they be separately described. The only feasible arrangement of this class of rights and their corresponding duties is not according to their contents, but according to their various modes of origin, describing the right and the duty in conjunction. This necessitates a very different mode of treatment of them from what is appropriate to rights *in rem,* and therefore requires their separation from the latter in an arrangement of the law.

In defining a protected right, the direct and theoretically proper way is to describe the state of fact which forms its content, and perhaps in a statute or code that way ought in all cases to be followed. But it is often practically more convenient to describe it indirectly by explaining how the right can be violated, and in form defining the right as a right not to have a certain result produced. But if that mode of description is adopted, it must not be inferred therefrom that the content of the right is an act. For instance, the content of the right of life is the state or condition of being alive: but it is sometimes convenient to speak of it as a right not to be killed.

II.

There are five kinds of states of fact which the law protects, giving rise to five classes of protected rights *in rem.* And these are all the rights *in rem* that there are in the private law. They are as follows:

Protected states of fact.	*Rights in rem.*
1. The condition of the party himself.	Rights of personal security.
2. The condition of other persons.	Rights in the persons of others.
3. The condition of material things.	Normal property rights.
4. Certain relations of things.	Abnormal property rights.
5. The party's pecuniary condition.	The right of pecuniary condition.

The first, second and fifth of the above mentioned rights are protected rights only; in the third and fourth, rights of other kinds are joined with the protected rights and must be defined in connection with them.

I. Rights of personal security comprise the rights of life, bodily security, mental security, liberty and reputation. Under each of these would fall to be described exactly what the state of fact is which the law protects, or what interferences with the person violate the right. The right of mental security is very limited in extent. Generally the law does not seek to protect a person against mere mental harm. How far it will do so is not yet quite settled.

II. Rights in the persons of other comprise the rights of husbands in their wives, parents in their children, masters in their servants, etc. Rights which one of the parties to such a relation has in the other, which are rights *in rem,* the duties corresponding to which rest on outsiders, must be distinguished from his rights against the other, which are rights *in personam,* whose corresponding duties rest on that other only.

III. A normal property right is a right *in rem* in a specific material thing. Every right having those two characteristics falls into this class of rights, however restricted its content, *e. g.,* the right of every person to use the public highway, which is in the nature of an easement. Besides such rights there are many rights which are classed as property for various purposes, which do not conform to the above definition, and may be conveniently designated as abnormal property.

Property rights are not exclusively protected rights; permissive rights are joined with the protected ones, and there are also some facultative rights which should be classed with property rights, such as powers of appointment and certain liens. The various species of property rights are groups or combinations of a few elementary rights, some kinds, such as ownership or fee simple, containing many of these elements, others, as easement or the right of a depositary, containing fewer. A full and systematic arrangement of the subject would therefore fall under the following heads.

A. The elementary rights of property. These are as follows.

(a) Permissive rights.

(1) The right of possession, *jus possidendi;* the holder of this right is permitted to take or keep possession of the thing.

(2) The right of use; which includes:

Innocent use;
Abuse or waste;
Fruits;
Taking a part of the thing, *profit a prendre.*

A person who has all of the above rights may deal with the thing in any manner that he pleases; but a person may have some of them without the others, and the right of use in any of its sub-divisions may be general or confined to particular modes of exercise as in easements. The right to transfer the thing is not a separate right, but transferability is one attribute of all property rights, and the physical delivery of the thing falls under use.

(b) Protected rights.

(1) The right of possession, *jus possessionis.* The content of this right is the fact of possession; it is violated not only by the possession of the thing by another, but by any physical contact with the thing, as by a mere entry on land.

(2) The right in the physical condition of the thing. Any change in that condition violates the right, except that incursions upon premises of impalpable things, such as noise, smoke or smells, do not always amount to violations of the right.

(c) Facultative rights. These will be no further noticed.

B. Ordinary property rights. These consist, as has been said, of larger or smaller groups of the above mentioned elementary rights. Under this head should be enumerated all the kinds of property rights recognized by law, and the elements included in each. Ownership includes all the permissive and protected rights in their most general form. Lesser estates and rights, inferior property rights, have more restricted contents. Thus a tenant for years has the permissive and protected rights of possession, the right of innocent use, and extensive rights in the condition of the land, but not as extensive as those of tenant in fee; the holder of an easement has no right of possession, but has limited rights of use and correspondingly limited rights in the condition of the land, some interferences with which do not violate his right. Facultative rights sometimes are attached to the minor groups of permissive and protected rights, as in the case of a pledgee's

power of sale, and sometimes stand as the sole constituents of inferior property rights, as in the case of maritime liens.

C. Modifications of property rights. The various species of property rights that would be described under the preceding head B, may exist subject to modes or modifications, which should be mentioned here. They may, for instance, be joint or several, conditional or unconditional, in "possession" or in expectancy, etc.

D. Rights in certain special kinds of things, such as wild animals, water, highways, dead bodies, etc.

E. Titles to property rights.

IV. Abnormal property rights. Some of these are rights *in personam*. So far as they are rights *in rem* they include such rights as franchises, patents and copyrights, which need not be further discussed here. Like normal property rights they are groups of permissive and protected rights, to which facultative rights may be attached, as is the case with franchises.

V. The rights of pecuniary condition. This is a protected right in the total value of a person's belongings. Subject to an exception presently to be noticed, any pecuniary loss to which a person is subjected is a violation of this right. This right is usually confounded with property; but it differs from property in the following respects:

(1) A person may have many separate rights of property in many specific things; but only one general right of pecuniary condition.

(2) Property relates to the possession and physical condition of things; this right, so far as it concerns things at all, to their value. A change in the physical condition of a thing which increases its value may nevertheless violate the owner's property right in it, and on the other hand, a thing may be reduced in value without any violation of any property right in it.

(3) To deprive a person of a right of property does not necessarily violate that right, but, every right being presumed to have a pecuniary value, it does violate the holder's right of pecuniary condition. Thus if A by fraud induces B to sell him his chattel for less than it is worth, B's property right is not violated. The physical condition of the thing is not impaired, nor is B's possession interfered with so long as he retains the right of possession. True, B ultimately parts with and A acquires the possession, but at that time A and not B is the owner with the right of possession. B has been unjustly deprived of his right of property and has suffered a pecuniary loss. The right

of his which has been violated is not his property right, but his right of pecuniary condition. If B repudiates the contract, and thus makes it void *ab initio,* the possession by A may be considered a violation of B's property right; but not if B affirms the contract and sues for the fraud.

(4) The rights of property and of pecuniary condition have to a large extent different duties corresponding to them. Generally speaking the duties that correspond to the latter right are duties of intention, and not even all the duties of that class, while to rights of property correspond also many duties of reasonableness and peremptory duties. In other words, an act that merely causes pecuniary loss without any interference with property is not generally a breach of duty unless it is done fraudulently or maliciously; but if an injury to property is in question, a person may commit a breach of duty by mere negligence or sometimes without even that.

Pecuniary loss may consist in the deprivation of some value which a person already has, *damnum emergens,* or in being prevented from acquiring a gain which one would have acquired, *lucrum cessans.* The former is always a violation of this right; the latter, according to the apparent weight of authority, is only so if the gain is one which the person had a "special right" to acquire. In connection with this right, two principles become important, (1) that the violation of any legal right imports damage, *i. e.* the violation of any other protected right is *per se* a violation of the right of pecuniary condition also, and (2) the principle that every right is presumed to have a pecuniary value, so that the deprivation of a right imports pecuniary loss.

The duties that correspond to rights *in rem* do not fall into any such natural and obvious arrangement as the rights do. The acts which form their contents shade off into each other, so that any grouping of them for the definition of distinct duties must be to some extent arbitrary and merely conventional. Nor is it worth while to attempt to define the different duties so that they shall be mutually exclusive; perhaps that is not even possible. The overlapping of duties, so that the same act or omission will be a breach of more than one duty, is a well recognized fact in the law, and in a code or systematic arrangement of the law the case of such overlapping would have to be considered in its appropriate place. The following arrangement of duties is submitted as a convenient one, the statements of the duties being, the reader will understand, not

intended as full and exact definitions, but merely as somewhat general descriptions, when more than a mere mention is attempted.

I. General peremptory duties.

(a) A person must not do any act the actual direct consequence of which is to cause physical contact between two persons, two things or a person and a thing, which contact amounts to a violation of any such person's right of bodily security, a right of another person in his bodily security or a right of possession in such thing. The authorities differ as to whether such contact must be produced intentionally or by negligence in order that the act may be a breach of the duty. This is the duty generally broken in a trespass. It corresponds to the rights above mentioned. The requirement of "force" in a trespass means that the duty can be broken only by an act, not by an omission, and that the act must result in a physical contact. The definitional consequences of this duty are actual and are such as impair the protected condition of fact, so that the corresponding right is necessarily violated at the same time with the breach of duty.

(b) The duty not to commit an assault is very similar to the above. Its breach is also a trespass; but it corresponds to rights of mental security, actual physical contact not being necessary to an assault.

(c) The duty not to remove the support of land or buildings corresponds to the right of support, which is a sub-division of the right in the physical condition of premises.

(d) A person must not take or keep possession of a thing in violation of another person's right of possession therein. This is not a duty actively to restore the thing to its rightful possessor, but a purely negative duty. It is defined by actual consequences which are also violative of its corresponding right, the right of possession.

II. General duties of reasonableness. All these duties correspond to rights of bodily security, rights of one person in the bodily security of another and normal property rights.

(a) A person must not do any act which is unreasonably likely to cause, *i. e.* is negligent because of its tendency to cause, a result which would be a violation of any other person's right of bodily security or his right in another's bodily security or of any normal property right.

This is a very general negative duty resting upon all persons in all circumstances. There is no such general duty of a positive nature. Generally speaking, no person is bound to do acts for another's

benefit. Duties to do acts always arise out of special circumstances.

(b) A person who has done or is doing an act which may cause such a result as is above mentioned must take such precautions as reasonableness requires to prevent that result.

If the original act is quite lawful, this is the only duty, and a failure to perform it will be a mere non-feasance. But if the original act was itself unreasonably dangerous, so as to be a breach of the preceding duty, and these precautions are not taken, a resulting injury may be considered as due either to the original act or to the subsequent omission, either to malfeasance or non-feasance. When the precautions ought to be taken at the same time as the original act but are omitted, the original act being itself lawful, the whole conduct, act and omission together, may usually be considered as a breach of duty in (a), and is then called misfeasance, or doing a lawful act in an improper manner; or the omission may be distinguished from the act and counted on as a breach of the duty in (b). Generally it makes no difference which view is taken.

What can be regarded as special cases of the two preceding duties are:

(c) The duty not to deliver a dangerous thing to another person in such circumstances as to expose him or others or their property to an unreasonable risk; and

(d) The duty of a person who invites another to put himself or his property into a situation of danger, to take due precautions against the danger.

III. Duties as to harmful things. There are certain things of such a dangerous or harmful nature that the law imposes special duties as to them, defined directly by reference to the state of the thing itself, though corresponding to the rights of bodily security and normal property. Here are found the chief cases where duties are defined by reference to what have been above called intermediate consequences.

Harmful things are of two kinds, dangerous things and nuisances. In general the difference between them is that the former are useful and necessary things and the law does not seek to prevent their existence entirely, but merely to guard against harm from them; while nuisances are things that in general ought not to exist at all, and the duties as to them are mostly directed to their extirpation.

(a) Dangerous things. The possessor of a dangerous thing must take reasonable precautions to prevent its doing harm. In the case of fire, animals *ferae naturae* and, in England and a few of

the United States, things of an actively dangerous nature, there are certain more stringent duties, namely, actually to prevent the harm, so that the duty is peremptory, and due care is not a defence if injury happens.

(b) Nuisances. The word nuisance sometimes denotes a thing and somethings a wrong committed by means of such a thing. There is much confusion between those two meanings, and courts often declare that a thing is not a nuisance when what is really meant is, not that the thing has not of itself that nature, but that some other element of a wrong is lacking. Here the word will be used in the former sense only, so that the mere fact that a thing exists and has itself the nature of a nuisance does not necessarily imply any wrong. To make a wrong there must be a breach of duty and other elements must be present, as will be hereafter explained.

Aside from the criminal law, things which are nuisances are of three kinds, namely:

(1) Nuisances by position; things which by merely being where they are violate property rights;

(2) Active nuisances; things which emit or change the direction of noxious things;

(3) Dangerous nuisances; things which, being what and where they are, are unreasonably likely to injure persons or property.

Duties as to nuisances are partly peremptory and partly duties of reasonableness. It is unnecessary to describe them in detail, but they fall into the following groups:

(1) Duties not to do acts that will or may cause the existence of nuisances;

(2) Duties to take precautions to prevent things from becoming nuisances;

(3) Duties to abate nuisances;

(4) In the exceptional cases where the law permits the existence of nuisances, duties to prevent them or to take precautions to prevent them from doing harm.

IV. Duties of intention.

(a) General duties. There are certain duties of a general nature not to do acts with an intention to produce certain injurious results. A full description of them, one by one, or even a brief description or enumeration of them, would occupy too much space to be gone into here, since to make it intelligible it would be necessary to go into an explanation of the different kinds of intention and of sundry other states of mind that are often legally equivalent to

intention, and a discussion of several conflicting theories as to the nature of malice. Some of these duties correspond only to certain rights of security and normal property, others to all rights of security, rights in the persons of others, and both normal and abnormal property, while others still include in their correspondence the right of pecuniary condition. For example, any intentional interference with a thing which belongs to another is wrongful, though the actor believes the thing to be his own or a *res nullius,* but hiring another man's servant, whereby he is induced to quit his master's service in violation of the latter's right, is not a wrong unless the hirer knows of the existing service. Certain malicious acts are actionable if they cause pecuniary loss, though no other right is violated.

(b) Certain more special duties. Malicious prosecution, abuse of process, and fraudulent misrepresentation are breaches of duties which correspond to all rights except perhaps reputation; mere pecuniary damage is a sufficient violation of right in these cases, but is not necessary. An action has been maintained against a man who persuaded a woman to have sexual intercourse with him by personating her husband, where the right violated was her security. Duties not to publish slanders and libels, to which the rules as to privileged communications formulate exceptions, correspond to rights of reputation.

V. The duties of tenants of land and bailees to their landlords and bailors, and of bailees of services, so far as these are not contractual but arise by "law" or "the custom of the realm," appear to the present writer to correspond partly to rights *in rem,* property or pecuniary condition, and partly to rights *in personam;* but it would doubtless be most convenient to treat of them all in one place. They generally overlap with contract duties, which undoubtedly correspond to rights *in personam,* and are often modified by contract.

VI. Duties of public officers, so far as these are owed to individuals.

VII. Statutory duties. Of these nothing can be said in general. The question that most often arises is whether the duty is or is not intended to correspond to private rights and be owed to private persons at all.

Most of the above mentioned duties are subject to certain exceptions, which are special to them; and there are also a number of more general exceptions which exist to all or nearly all of them. The chief of these latter fall under the five heads of (1) the exercise

of public or private authority, (2) defence and protection of one's own person or property or that of others, (3) license or the voluntary taking of risk, (4) receiving possession of a thing in good faith from a person who has possession, and (5) special susceptibility in the person or thing injured.

Rights *in personam* and their corresponding duties fall into two great divisions, namely (I) obligations and (II) equities. The word obligation is here used in its Roman sense, to denote the legal relations, *juris vinculum,* between the parties, consisting of a right on one side and a duty on the other. Many equitable rights and duties, indeed the majority of them, are of the nature of obligations, but are excluded in the following enumeration.

Generally the states of fact that form the contents of rights *in personam* are of the same nature as in rights *in rem,* though often more restricted in their scope. Thus in a debt, the state of fact that is protected for the creditor is like a part of his right of pecuniary condition; and in the case of a contract for the sale of land the possession of the land, which is also the content of a right *in rem,* is a part at least of the content of the protected contract right, though not the whole of it.

I. Obligations, according to their modes of acquisition, are classified as follows:

(a) Obligations created by the direct act of the state, as by statute or the judgment or decree of a court.

(b) Obligations created by the agreement of the parties. The most important of these are contract obligations, where the agreement takes the form of a promise; but a debt can be created by a deed of grant. Many equitable obligations are also created by agreements, such as gifts in trust and declarations of trust, which are not properly contracts but rather in the nature of gifts or conveyances. Of this class of obligations the content, the state of fact to be protected, is determined by the agreement.

Implied contracts, so far as these rest upon presumptions that the parties intended to contract, belong here. But there is a class of obligations which in our law are said to arise from implied contract, when no such presumption can properly be made. These were classed with contract obligations merely to bring them within the scope of the action of *assumpsit;* but the supposed contract is a pure fiction. Behind the fictitious contract there is always some actual act or event out of which the obligation really arises, which is capable of being described. Indeed it is already recognized in our law as giving rise to an obligation, namely, a debt. Then the fictitious contract is posited in the form of a promise to pay

that debt. "Being indebted, he undertook and promised to pay," is the formula of the old declarations. The debt is an actual one, and the facts from which it has arisen are actual facts. An action of debt would lie without the implied promise, but formerly would have been obnoxious to the defendant's wager of law, to avoid which the fiction of a promise was resorted to and *assumpsit* substituted for debt. Now that forms of action and wager of law are abolished, there seems no good reason to retain the fiction. It would be better to describe these obligations as non-contractual ones, classifying them according to the actual facts out of which they spring.

(c) Obligations arising from the acceptance of services. These are obligations to pay at once, technically "on demand," the reasonable value of the service. The service must as a general rule be rendered with the expectation of payment, not as a mere kindness.

(1) When the service is accepted voluntarily the obligation generally arises. In this case there is usually also an actual contract to pay, express or implied, and an action may be brought either on the contract or on the non-contractual obligation, the form of action in the former case being special *assumpsit* and in the latter debt or *indebitatus assumpsit.*

(2) When the acceptance is not voluntary our law as a general rule creates no obligation, but in a few cases it does. Obligations arising in this way have been aptly turned by Mr. Holland meritorious obligations. The obligation to pay for salvage services is an example of them, and in the Roman law the rights of a *negotiorum gestor.*

(d) Closely connected with the foregoing are obligations to make compensation for benefits derived from the use of another's property. Thus if A's logs are carried and left on B's land by a freshet, it has been held that A may enter and take them, but must compensate B for any injury done to the land.

(e) Obligations to restore, arising from holding something of another's. If the duties of tenants and bailees to restore the land or chattel to its owner are really obligations, they belong here. There are also many obligations of this sort which are equitable. Besides the above, the most important obligations of this class are those which arise from getting possession of a sum of money belonging to another, which were the foundation for the old action for money had and received, and coincide with some of the obligations *quasi ex contractu,* which in the civil law are said to arise from unjust enrichment.

(f) Obligations arising under penal statutes should also be mentioned.

It appears to the present writer that the class of obligations called in the Roman law obligations *ex delicto* is not recognized in our law; that our law does not regard a tort as giving rise to an obligation or an action of tort as in the nature of a proceeding for the specific enforcement of an obligation to make compensation.

II. Equities.

The essential nature of an equitable right is that it is a claim in favor of one person upon a right held by another. Regularly the holder of a right may exercise, enforce or dispose of it in any way that its nature admits of entirely at his own pleasure. But if he holds it subject to an equity, another person has a claim which he must not disregard. An equity is not a right in the thing which forms the subject of the other right, but is a claim upon the right. If A is the legal tenant in fee and B has an easement in the land, B's right is a right directly in the land; the land, the material thing, is its subject, and the right exists against all the world. But if A holds in trust for B, B has no right in the land, A can sell and convey to a *bona fide* purchaser for value free of the equity. and B can have no action even in equity against a stranger who intrudes on the land. B's right is a claim on A's estate, on his right, not on the material land; it is a right *in personam* against A only, or in some cases against A's successor in title. At the same time it is more than a mere personal claim against A; it is a claim on that specific right held by A.

This conception of an equity as a claim on a right, controlling the holder of the right in his disposition of it, if not actually peculiar to our law, has been extended and developed in our law to a much greater extent than in the civil law, and has been found eminently convenient and beneficial. It should be given full recognition in a code or arrangement, although some rules which are now only equitable might no doubt with advantage be adopted also at law and thus made general and taken out of the special department of equity.

As to nomenclature; at present the holder of the right subject to the claim is usually called the trustee, the claimant the *cestui que trust*, the claim itself a trust, while for the right held subject to the trust there is no recognized name, unless it happens to be a property right and can be designated as the trust property. The objection to this nomenclature is that the word trust is also used in a narrower sense, to denote a single class of equities which have certain important peculiarities of their own. It is not desirable to

use the word, and its connected terms, trustee and *cestui que trust* in both senses; confusion has often arisen from doing so; and it is submitted that the narrower significations are the more appropriate. In the wider sense, applicable to all equities, the following names are suggested: the right held subject to an equity should be called the basis-right; the person in whom that right is vested, the basis-right-holder; the party in whose favor the claim exists, the equitable claimant; and his claim itself, the equity.

The equity itself is either an obligation, a protected right having a corresponding equitable duty which rests on the basis-right-holder, or is a lien, a mere facultative right exercisable by the aid of a court, but with no corresponding duty. Even if the lien is given, as it usually is, to secure the performance of some duty, the duty does not correspond to the lien; it may be a legal and not an equitable duty, and could equally well exist were there no lien.

Wrongs, in the sense of civil injuries, omitting crimes to which the following analysis does not wholly apply, have the following elements.

1. An act or omission which is a breach of some duty that corresponds to a private right and is owed to a private person. Without a breach of duty, any damage that happens to a person from the conduct of others is *damnum absque injuria.*

2. A violation of right. A negligent act, for instance, or a mere malicious attempt to do an injury, though it may be a breach of duty or even a crime, is not an actionable wrong unless a violation of right follows.

3. Correspondence between the duty broken and the right violated. Without this correspondence a breach of duty followed by a violation of right is still not a wrong. The reason why a life insurance company can not have an action against a person who negligently kills one of its policy holders is that the duty not to act negligently does not correspond to the right of pecuniary condition, which is the only right of the company that is violated. On the same principle it was held that where the plaintiff had contracted with a township to support a pauper and furnish him with necessaries for a year for a fixed sum, he could not have any action against the defendant, who beat and wounded the pauper, whereby the plaintiff was put to expense for medical attendance and nursing for the pauper. The duty not to beat another corresponds to rights of personal security; but the plaintiff had no right in the pauper's security, only his right of pecuniary condition was violated.

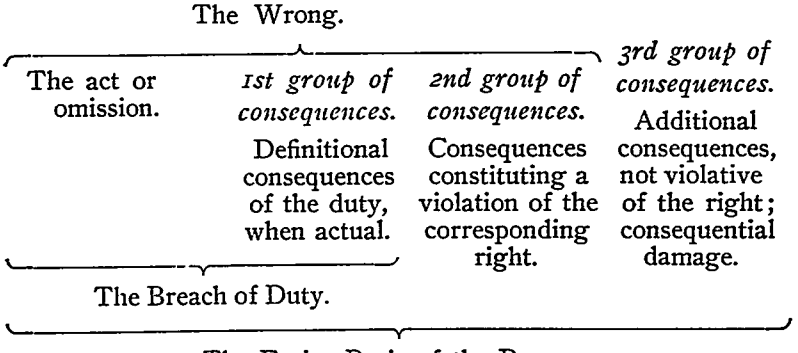
Want of correspondence between the duty and the right is

usually confounded with remoteness of the injurious consequences, but it is not the same thing.

4. The violation of right must be the actual consequence of the act or omission which constitutes the breach of duty. This is obvious. The rule that a fraudulent misrepresentation is not actionable unless it is actually believed and acted upon is an application of this principle, and must not be confounded with the rule that in order to make a false representation fraudulent it must be intended to be believed and acted on.

5. The violation of the right must not only be the actual consequence of the conduct, but in the legal sense its proximate consequence. The law as to proximateness of consequences is in a very confused and unsatisfactory state.

The foregoing are the elements of the wrong itself. If any one of them is missing there is no legal wrong and no cause of action, however blameworthy the conduct of one party or however great the damage to the other. But when a complete wrong has once been made out, the recovery of damages is not necessarily confined to compensation for the wrong itself. Further injurious consequences, "consequential damage," resulting from the wrong may often be recovered for, if properly alleged. To these injurious consequences extraneous to the wrong the rules apply that they must be the actual and proximate consequences of the wrongful act or omission. But they need not be violations of the right to which the duty corresponded. For instance, although the duty not to commit an assault and battery does not correspond to the right of pecuniary condition, yet if bodily injury is proved amounting to a violation of the right of security to which that duty does correspond, then resulting pecuniary loss forms a proper basis for additional damages. The elements of a ground of recovery are shown in the following diagram:



The first group of consequences will be absent if the duty is not defined by actual consequences, and if present may wholly or partly coincide with the second group. The third group may or may not be present.

The following is an outline of an arrangement of the substantive private law of normal persons based on the foregoing analysis.

Part First. Definitions and General Principles.

This part should contain definitions of all legal conceptions that are to be used as *praecognoscenda* in defining duties, rights and wrongs and certain general rules relating to them; *e. g.* definitions of such terms as person, thing, fact, act, intention, negligence, possession, juristic act, agreement, contract, duty, right, wrong, etc., and such general rules as those relating to presumptions of death, kinship, presumptions as to possession, the computation of time, etc.

The word contract has two meanings. It denotes sometimes the juristic act from which an obligation results, as when we say that a contract requires a consideration or is voidable for fraud; and sometimes it denotes the obligation itself, as when we speak of the extinction or assignment of a contract. All that relates to the first of these, to the nature and validity of the juristic act, falls into this first part; the treatment of the resulting obligation would belong to the next.

Part Second. Rights and Duties.

(1) Rights *in rem.*
  (a) The rights.
  (b) The duties and exceptions to them.

(2) Rights *in personam.*
  (a) Obligations.
  (b) Equities.

Under obligations would fall to be discussed how obligations arise, and the transfer, modification, extinction and performance of them. Some rules on these subjects apply to obligations generally, and some to particular classes of obligations only.

(3) The overlapping of duties.

Part Third. Wrongs.

The greater part of what is now usually discussed under the head of torts concerns the duties broken and the rights violated. That would not fall here. This part of the law would in fact be rather short, being confined mostly to the subject of the necessary conjunction of the various elements to make a wrong, and rules as to the locality of wrongs, where a wrong must be deemed to have been committed when its different elements exist in different places,

and the identity of wrongs, whether a given group of elements amounts to one wrong or more than one.

Part Third. Remedies.

The points to be considered here are whether the law gives any remedy for a wrong, as it sometimes does not, *e. g.* in cases where the complainant has been guilty of contributory wrong, or when the wrong is a common injury to all members of the community, as in the case of some public nuisances; and what is the proper remedy for such kind of wrong, and the election between remedies if there is more than one. But the procedure by which the proper remedy is to be obtained falls under the adjective law.

Henry T. Terry.